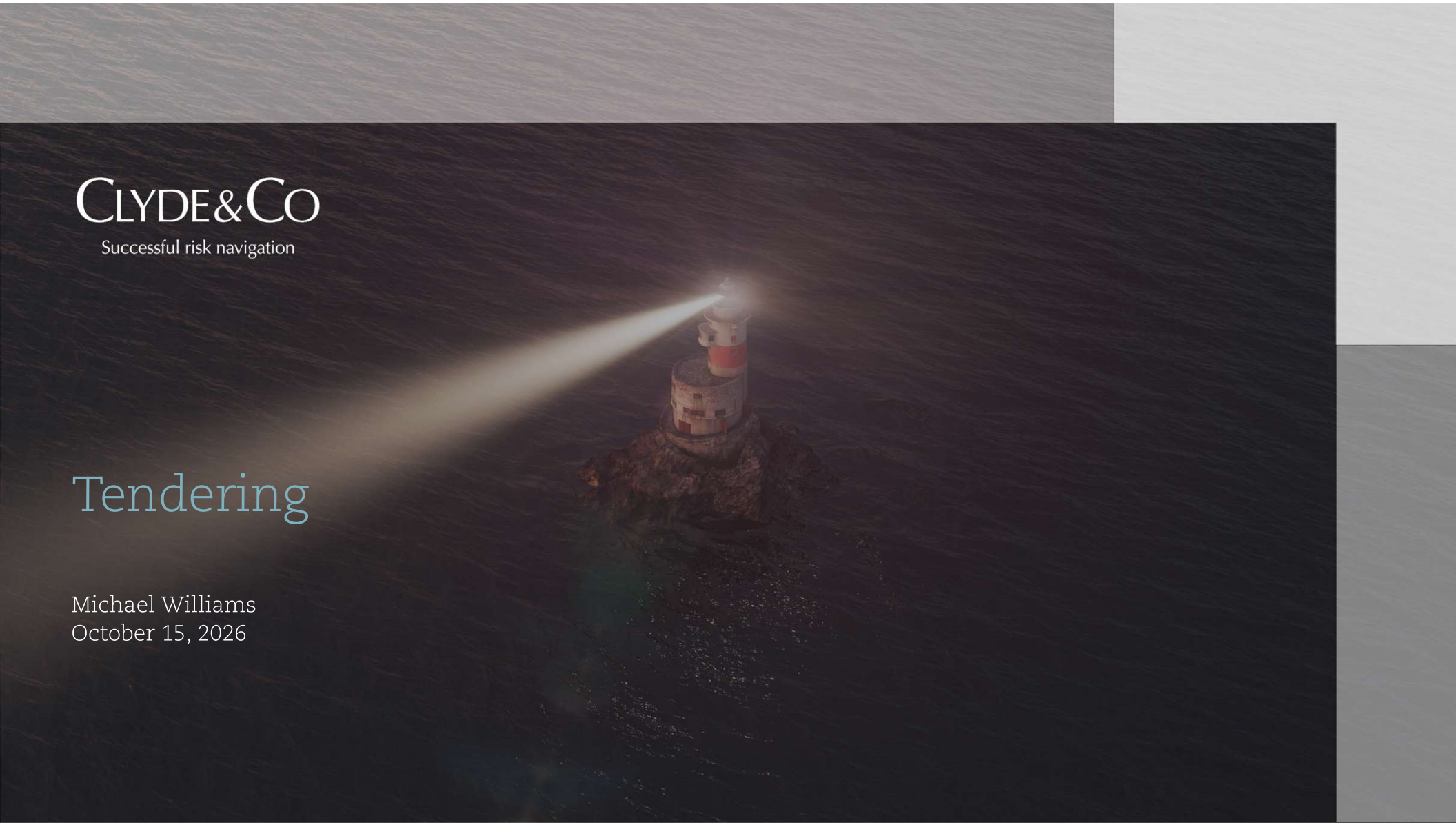


CLYDE&CO

Successful risk navigation

# Tendering

Michael Williams
October 15, 2026

# What is a Tender?

## The Tendering Process

Tendering is a formal and competitive process for construction projects.

Allows a party to invite, evaluate, and award contracts to bidders.

1. **Call/invitation to tender**
2. **Submission of bids/tenders by contractors**
3. **Evaluation of bids/tenders by owner**
4. **Award to successful bidder, who is bound to proceed**



# Is it an Invitation to Tender?

## Request for Quote (RFQ)

RFQs are less formal and include the following:

- Submission of less formal documentation by owner
- No bid contract
- Contractors submit proposals for how the work is to be executed and pricing
- Further negotiation occurs, scope adjustments, etc.

# Is it an Invitation to Tender?

## Formal Invitation to Tender

ITTs can have the following hallmarks:

- Formality of tender process
- Instructions to bidders on process
- Period of irrevocability
- Bidders not solicited (ITT can go out to the general public)
- Anonymous bidders
- Scope of work is highly defined (little room for design variations)
- Lowest bidder rule
- Prohibition on negotiation
- Strict compliance rules
- Includes a bid contract (binding form of Contract B)

# Contract A and Contract B

## Contract A (Bidding Contract)

- Tender package sets out the rules and process of the tendering process itself
    - Rules of submission
    - Period of irrevocability

      Closing Dates
    - Evaluation criteria
    - Lowest Bidder rule
- Contract A is formed the moment a contractor submits a compliant bid
- Exists between the owner and each compliant bidder

# Contract A and Contract B

## Contract B (Construction Contract)

- Tender package also includes the construction contract
- Becomes binding when owner formally accepts a single, winning compliant bid
- Governs the actual performance of the work, including scope, price, progress payments, schedule, etc.
- The terms of Contract B are NOT negotiated

# *Tercon Contractors v. B.C. (Min. of Transportation)*

"Whether contract A is formed depends on the precise language and intention of the tender call. The court will look only to the substance of the transaction in the context of the procurement documents in order to determine whether the parties intended to enter into contractual relations….The courts have recognized several factors or terms indicative of an intent to form contract A. The irrevocability of the bid is one such factor….Other factors include the formality of the procurement process, whether tenders are solicited from selected parties, whether there was anonymity of tenders, whether there is a deadline for submissions and for performance of the work, whether there is a requirement for security deposit, whether evaluation criteria are specified, whether there was a right to reject proposals, whether there was a statement that this was not a tender call, whether there was a commitment to build, whether compliance with specifications was a condition of the tender bid, whether there is a duty to award contract B, and whether contract B had specific conditions not open to negotiation….

The label or name of the tender document is not a determinative factor….Neither is the requirement for a security deposit or the existence of established timelines…."

# Contract A and Contract B

## Owner Breaches of Contract A

**Potential breaches by owner:**

- Failure to evaluate fairly
- Accepting non-compliant bids
- Secret negotiations/bid shopping
- Improper bid withdrawal

**Remedies for bidders:**

- Lost profits bidder would have earned if Contract B were awarded (expectation damages)
- Return of bid deposit
- Recovery of wasted preparation costs (reliance damages)

# The tender documents

- Invitation to Bid
- Instructions to Bidders
- Tender Form
- Scope of work and design documents
- Contract B



# Privilege clauses

- The lowest or any tender will not necessarily be accepted.
- Tender irregularity may be a cause for rejection/can be waived.
- Price + other criteria + best interest can be taken into consideration.
- Limited or no liability for treatment of tender (**Tercon**).

# Non-compliance

- Irregularity vs. non-compliance
- Waivable non-material non-conformance vs. non-waivable material non-conformance
- Material = affecting the price or performance of Contract B



# Subcontract tenders

Contract A/Contract B can apply

General contractor must stick with subcontract bid if it is expressly picked up in GC's tender

# Bid shopping

"…where a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded, with a view to obtain a better price or other contractual advantage from that particular tenderer or any of the others."

*Stanco Projects Ltd. v. Her Majesty the Queen and Aplin & Martin Consultants Ltd.*
2006 BCCA 246

# Engineers and architects

## Common services

- Preparation of tender documents and contract
- Receipt and evaluation of tenders
- Advice to client concerning tendering cans and cant’s
- Tendering for consulting contracts



# Engineers and Architects

## Areas of Risk

- Post-tender negotiations

  *Stanco Projects Ltd. v. Her Majesty the Queen and Aplin & Martin Consultants Ltd.* 2006 BCCA 246

- Deficient tender documents (negligent misrepresentation)

  *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.* [1993] 3 S.C.R. 206



# General contractors vs construction managers



- General contractor as bidder
- Construction manager as administrator of trade contract tendering process/evaluator and advisor to owner/bidder

# Procurement best practices

Understand tendering law

Keep it simple

Quality control to guard against mistakes

Comply with Contract A

Play fairly, to maintain "the integrity of the bidding system"

CLYDE&CO

Successful risk navigation

# Thank you. Any questions?

Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary. No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.
© Clyde & Co LLP 2025
V2.25

Michael Williams
Senior Counsel, Vancouver
Michael.williams@clydeco.ca
+1 604 684 0727

Clyde & Co LLP

www.clydeco.com